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12 INC.

13 UNITED STATES DISTRICT COURT

14 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

15
16 MICHELLE ALBAHAE, CHELSEA
17 ARANJO, MEGAN ARCADY,
18 JESSICA AURIANA, JULIETTE
19 BALL, CHELSEA BALMER,
20 REBECCA BARNHOUSE, TIFFANY
21 BERRY, DONNA BOWEN, ASHLEY
22 BRANNING, EMMA BRODERICK
23 JOANNE BROWN, HEATHER
24 BURKETT-MURPHY, HOLLY
25 BURKHART, HILARY CECILE,
26 MACKENZIE COGLE, ASHLEY
27 COURTNEY, ANGELINA DA
28 GAMA, SARAH DAHAN, HOPE
DALEY-DERRY, ROBIN DANIELS,
ROXANNA DE LA CRUZ,
KATHERINE DONNELLY,
BRIANDA EARLE, MONICA
EASILY, JACOB EISEN,
MICHELLE ESTRADA, SANDRA
FERGUSON, AMANDA
FONTENOT, DENISHA FREEMAN,
HEATHER GARON, JENNIFER
GEORGESON, ALANA GREEN,
NICOLE HOFF, MONICA
HOLLIFIELD INDIVIDUALLY AND

CASE NO. 2:23-cv-00982-RGK (PLAx)

**NOTICE OF MOTION AND
MOTION TO DISMISS FIRST
AMENDED COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES**

**[[PROPOSED] ORDER LODGED IN
CHAMBERS]**

Date: May 15, 2023

Time: 9:00 a.m.

Crtrm.: 850, 8th Floor

Roybal Federal Building and
U.S. Courthouse

Assigned to Hon. R. Gary Klausner,
Judge of the United States District
Court

Trial Date: None Set

1 ON BEHALF OF S. H., LAUREN
HUDSON, TIFFANY HUVAL,
2 ALEHA INGLE, HEATHER
JACKSON, KHILA JAMES, KAT
3 JOHNSTON, JESSICA JONES
INDIVUALLY AND ON BEHALF
4 OF P. J., EUNICE KAHLER, TANYA
KARAKASHEVA, KATHLEEN
5 KEEHNER, LIZA KRENGEL, ANNA
KURILOVA, JULIA LEON, KRISTIE
6 LETIZIA, TINA LEWIS, LAURA
LLEWELLYN, STACEY LOBDELL,
7 LLASMIN LOZOYA, LYANA
LUCIANO, KIM MARIETTA,
8 THERESA MCCORMACK, LESLIE
MCDONALD, LISA MENDEZ, JILL
9 MOOSHAGIAN, JENNIFER
MORGAN, AMANDA MURPHY,
10 JESSICA NGUYEN, LESLIE ORR,
HEATHER PASSMORE, SYLVA
11 PATE, SARA PETTY, DANIELLE
PHELPS, ERICA PILICY-RYAN,
12 ROBIN POSTON, NICOLE
QUENGA, MELINDA QUINN,
13 CHARITY REDDISH, NATALIE
REGISTER, JEAN RICCIO SARAH
14 RICHARDSON, HEATHER RIFE,
ALEXA ROEMER, FELICIA
15 SANCHEZ, AMY SHAY, FARZANA
SIDDIQUEI, DANIELLE SIGMON,
16 RHIANNON SINGER, JODI
SOBIECH, MARIA SOKOLOVA
17 DEBRA STERLACCI, MIECHA
ISYS THOMAS, VANESSA TOCCO,
18 NOEL TALERICO, MARINA
TOLIC, LESLIE TOLSTOY,
19 ALEXANDRA URRESTI,
REBEKAH VALENTINE, TANYA
20 VALLEJO, JERRIKA VEGA,
CHRISTINA VENTOR, ROBIN
21 VOGT, TERRI WITTS, ROBIN
YEAGER and MAUREEN
22 ZAVATONE,

23 Plaintiffs,

24 vs.

25 OLAPLEX HOLDINGS, INC. AND
COSWAY CO., INC.,

26 Defendants.
27
28

1 TO ALL PARTIES AND TO THEIR RESPECTIVE ATTORNEYS OF
2 RECORD:

3 PLEASE TAKE NOTICE that on May 15, 2023, at 9:00 a.m., or as soon
4 thereafter as the matter may heard in Courtroom 850, 8th Floor, of the United States
5 District Court of California, Roybal Federal Building and U.S. Courthouse, located at
6 255 East Temple Street, Los Angeles, CA 90012, Defendant COSWAY CO., INC.,
7 will, and hereby does, move for an order dismissing the claim and prayer for punitive
8 damages from the First Amended Complaint (Dkt. No. 43), for failure to state a claim
9 upon which relief can be granted, pursuant to Federal Rules of Civil Procedure 9(b)
10 and 12(b)(6).

11 Specifically, Defendant requests an order dismissing the claim and prayer for
12 punitive damages on the grounds that Plaintiffs fail to allege sufficient facts plausibly
13 establishing their right to recover punitive damages against this Defendant.

14 This Motion is based upon this Notice of Motion, the accompanying
15 Memorandum of Points and Authorities, the Declaration of Gina E. Och filed
16 concurrently herewith, and [Proposed] Order lodged herewith, and such further oral
17 and/or documentary evidence as may properly be presented at the time of the hearing
18 of this matter, if any.

19 This Motion is made following the conference of counsel pursuant to Local
20 Rule 7-3, which took place on March 20, 2023, March 27, 2023, and March 28,
21 2023.¹

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23 ///

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26 _____

27 ¹ As a result of the parties' conference of counsel, Plaintiffs agreed to dismiss the Third
28 Cause of Action for Violation of California Consumer Protection and False Advertising Law against
Defendant COSWAY CO., INC.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

This litigation arises out of the purchase and use of Olaplex hair care products by 100 Plaintiffs around the country and world. First Amended Complaint (“FAC”) (Dkt. No. 45), ¶¶ 1, 7-107. Plaintiffs allege that Defendants COSWAY CO., INC. (“Cosway”) and OLAPLEX HOLDINGS, INC. (“Olaplex”) jointly designed and manufactured these Olaplex hair care products, and that Olaplex marketed, distributed and sold these products. FAC, ¶¶ 1, 110.

Plaintiffs are asserting the Second Cause of Action for Breach of Implied Warranty, Fourth Cause of Action for Negligence and/or Gross Negligence, Fifth Cause of Action for Product Liability and Strict Product Liability, and Sixth Cause of Action for Unjust Enrichment pled in the FAC against Cosway. With respect to the Third Cause of Action for Violation of California Consumer Protection and False Advertising Law, Plaintiffs have agreed to dismiss the cause of action against Cosway. Declaration of Gina E. Och, ¶ 3. In addition to these causes of action, Plaintiffs are suing Cosway for punitive damages. FAC, ¶ 264 of the Fourth Cause of Action for Negligence and/or Gross Negligence, Prayer.

As will be explained more fully, Plaintiffs offer no facts in support of the elements of oppression, fraud, or malice under California Civil Code § 3294, let alone state factual allegations plausibly establishing a claim of or prayer for punitive damages against Cosway as required by Federal Rules of Civil Procedure 9(b) and 12(b)(6). Accordingly, Cosway moves the Court to dismiss the punitive damages claim and prayer against Cosway.

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1 II.

2 ARGUMENT

3 A. **Plaintiffs' Punitive Damages Claim and Prayer Should Be Dismissed**
 4 **Because Conclusory Allegations and Invalid Inferences Do Not and**
 5 **Cannot Establish Liability for Punitive Damages against Cosway.**

6 To survive a motion to dismiss, “a complaint must contain sufficient factual
 7 matter, accepted as true, to 'state a claim to relief that is plausible on its face.’”
 8 Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937 (2009) (quoting Bell Atl. Corp.
 9 v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955 (2007)); Moss v. United States
 10 Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009) (“[F]or a complaint to survive a
 11 motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences
 12 from that content, must be plausibly suggestive of a claim entitling the plaintiff to
 13 relief.”) (citing Twombly and Iqbal). At a minimum, the plausibility standard “asks
 14 for more than a sheer possibility that a defendant has acted unlawfully.” Id. (quoting
 15 Twombly, 550 U.S. at 556). Consequently, a court need not accept as true
 16 unreasonable inferences, unwarranted deductions of fact, or conclusory legal
 17 allegations cast in the form of factual allegations. Pareto v. FDIC, 139 F.3d 696, 699
 18 (9th Cir. 1998) (“conclusory allegations of law and unwarranted inferences are not
 19 sufficient to defeat a motion to dismiss”). This means that dismissal is proper if it is
 20 vague, conclusory, and fails to set forth any material fact in support of the allegation.
 21 N. Star Int'l v. Ariz. Corps. Comm'n, 720 F.2d 578, 583 (9th Cir. 1983).

22 With respect to a claim of punitive damages, a motion to dismiss is the proper
 23 procedural vehicle. Kelley v. Corrections Corp. of Am., 750 F. Supp. 2d 1132, 1146
 24 (E.D. Cal. 2010); see also Consumer Sols. REO, LLC v. Hillery, 658 F. Supp. 2d
 25 1002, 1020 (N.D. Cal. 2009) (“The proper medium for challenging the sufficiency of
 26 factual allegations in a complaint is through Rule 12(b)(6) not Rule 12(f).”). While
 27 Rule 9(b) provides that “malice, intent, knowledge, and other conditions of mind of a
 28 person may be averred generally,” Fed. R. Civ. P. 9(b), the FAC must still contain

“sufficient factual matter, accepted as true, to state a claim to [punitive damages] that is plausible on its face.” Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 570); see also Buehner v. Titlemax of Cal., Inc., 2021 U.S. Dist. LEXIS 215627, at *4 (C.D. Cal. Sept. 23, 2021) (applying Iqbal and Twombly pleading standard to punitive damages allegations). Again, this means that a dismissal is appropriate where the complaint lacks either a cognizable legal theory or sufficient facts to support a cognizable legal theory. Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008).

Taking heed of these directives, and by careful examination of Plaintiffs' FAC, the Court can only conclude that Plaintiffs' claim and prayer for punitive damages are utterly lacking because Plaintiffs' general averments of Cosway's purported liability do nothing “to raise a right to relief above the speculative level” against Cosway. Twombly, 550 U.S. at 556. Accordingly, the Court may and should dismiss the claim and prayer of punitive damages, especially because no amendment can cure the pleading defects.

B. Plaintiffs' Claim and Prayer for Punitive Damages Should be Dismissed.

Under California Civil Code § 3294, a party may recover punitive damages “[i]n an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.” Cal. Civ. Code § 3294(a).

The defendant “must act with the intent to vex, injure or annoy, or with a conscious disregard of the plaintiff's rights. [Citations.]” Where nonintentional torts involve conduct performed without intent to harm, punitive damages may be assessed “when the conduct constitutes conscious disregard of the rights or safety of others.” “[A] conscious disregard of the safety of others may [thus] constitute malice within the meaning of section 3294 of the Civil Code. In order to justify an award of punitive damages on this basis, the plaintiff must establish that the defendant was aware of the probable dangerous consequences of his conduct, and that

1 he willfully and deliberately failed to avoid those
 2 consequences.” Consequently, to establish malice, “it is not
 3 sufficient to show only that the defendant's conduct was
 4 negligent, grossly negligent or even reckless.”

5 Bell v. Sharp Cabrillo Hosp., 212 Cal.App.3d 1034, 1043-44 (1989) (citations
 6 omitted).

7 Plaintiffs seek punitive damages based on their Fourth Cause of Action for
 8 Negligence and/or Gross Negligence. See FAC, ¶ 264 of the Fourth Cause of Action
 9 for Negligence and/or Gross Negligence (“As a direct and proximate result of
 10 Defendants’ above-referenced negligence and gross negligence, Plaintiffs have
 11 suffered and are entitled to recover damages, both compensatory and punitive.”). In
 12 support of their *negligence* cause of action, Plaintiffs conclusory allege that
 13 Defendants “*intentionally* fail[ed] to follow industry standards that prohibit the use of
 14 chemicals that are allergens, sensitizers and/or irritants, are carcinogenic, or for which
 15 there is inadequate data to determine their safety for use in products used for long or
 16 indefinite periods of time on the skin.” FAC, ¶ 260 (emphasis added). In addition to
 17 Paragraph 260, Plaintiffs rely on allegations pled at Paragraphs 262 and 263. FAC, ¶¶
 18 262, 263. Thus, according to Plaintiffs, Cosway is negligent because it “breached this
 19 duty [of care] by producing, processing, manufacturing, distributing and/or offering
 20 for sale the Products in a defective condition that was unsafe for use at home by
 21 consumers.” FAC, ¶ 259. However, as previously noted, “negligence, even gross
 22 negligence[,] is not sufficient to justify an award of punitive damages.” Simmons v.
 23 S. Pac. Transp. Co., 62 Cal.App.3d 341, 368-69 (1976). For this reason alone, the
 24 punitive damages claim should be dismissed.

25 Despite the allegations pled in the FAC, during the conference of counsel,
 26 Plaintiffs indicated that they are also relying on allegations pled in support of their
 27 Fifth Cause of Action for Product Liability and Strict Product Liability. “Punitive
 28 damages may be awarded in a product liability action if it is shown that the defendant
 placed a product on the market in conscious disregard of the safety of consumers and

others.” Ehrhardt v. Brunswick, Inc., 186 Cal.App.3d 734, 741 (1986). “Conscious disregard” means that the defendant “was aware of the probable dangerous consequences of his conduct, and that he willfully and deliberately failed to avoid those consequences.” Butte Fire Cases, 24 Cal.App.5th 1150, 1159 (2018). Thus, defendant must “have actual knowledge of the risk of harm it is creating and, in the face of that knowledge, fail to take steps it knows will reduce or eliminate the risk of harm.” King v. U.S. Bank Nat’l Ass’n, 53 Cal.App.5th 675, 711 (2020); Hardeman v. Monsanto Co., 997 F.3d 941, 971 (9th Cir. 2021).

Here, as the Court will note, there are no punitive allegations pled in connection with Plaintiffs’ Fifth Cause of Action for Product Liability and Strict Product Liability as to Cosway. Regardless, Plaintiffs essentially allege that “Cosway designs and assists in the marketing of the Products,” the products are defective as a result of the design, and the “Products are [also] defective due to inadequate and unsafe warnings/instructions for use of the Products” and because the “post-market warnings/instructions are inadequate and unsafe....” FAC, ¶¶ 266-268. Plaintiffs further contend that the Court may infer, *inter alia*, that Cosway participated in the design of warnings and instructions for use due to its alleged participation in the design of the products.

When it comes to knowledge, Plaintiffs merely allege that the design of the hair care products is dangerous because the alleged use of ingredients known to be irritants, sensitizers, and carcinogens. FAC, ¶¶ 119-120, 124. As previously noted in connection with their negligence cause of action, Plaintiffs simply conclude: “Defendants knew, or in the exercise of reasonable care should have known, that the Products present an unacceptable risk to consumers, and would result in damages that were foreseeable and reasonably avoidable.” FAC, ¶ 262. Even if accepting these allegations as true, at most, it shows negligence or non-deliberate conduct by Cosway in the alleged design of the product, not Cosway’s “conscious disregard” of Plaintiffs’ safety or its “*actual* knowledge of the risk of harm it is creating and, in the face of

1 that knowledge, [its] fail[ure] to take steps it knows will reduce or eliminate the risk
 2 of harm” in support of punitive damages. King, 53 Cal.App.5th at 711. Simply
 3 because Plaintiffs may have set forth allegations of negligence or products liability
 4 does not mean that they have set forth malicious or oppressive conduct by Cosway
 5 sufficient to warrant a plausible claim for punitive damages.

6 Finally, Cosway also seeks to dismiss Plaintiffs' request for punitive damages
 7 on the basis that the FAC does not adequately plead the requirements for recovery of
 8 such damages against a corporation under § 3294(b). California Civil Code § 3294(b)
 9 provides:

10 An employer shall not be liable for damages pursuant to
 11 subdivision (a), based upon acts of an employee of the
 12 employer, unless the employer had advance knowledge of
 13 the unfitness of the employee and employed him or her with
 14 a conscious disregard of the rights or safety of others or
 15 authorized or ratified the wrongful conduct for which the
 16 damages are awarded or was personally guilty of
 oppression, fraud, or malice. With respect to a corporate
 employer, the advance knowledge and conscious disregard,
 authorization, ratification or act of oppression, fraud, or
 malice must be on the part of an officer, director, or
 managing agent of the corporation.

16 Cal. Civ. Code § 3294(b).

17 “An employer shall not be liable for damages pursuant to subdivision (a),
 18 based upon acts of an employee of the employer, unless the employer ... was
 19 personally guilty of oppression, fraud, or malice. With respect to a corporate
 20 employer, the ... act of oppression, fraud, or malice must be on the part of an officer,
 21 director, or managing agent of the corporation.” Colucci v. T-Mobile USA, Inc., 48
 22 Cal.App.5th 442, 451 (2020). Consequently, California federal district courts have
 23 consistently held that a plaintiff who seeks punitive damages against a corporate
 24 defendant must plead more than “non-conclusory allegations that an officer, director
 25 or managing agent of the defendant authorized or ratified the conduct that constitutes
 26 malice, fraud or oppression.” Bose v. Wahl Clipper Corp., No. CV 11-06087 MMM
 27 (SHx), 2012 WL 12861186, at *6 (C.D. Cal. Mar. 29, 2012); see also Rhynes v.
 28

1 Stryker Corp., No. 10-5619 SC, 2011 WL 2149095 (N.D. Cal. May 31, 2011)
2 (holding that “conclusory allegations of authorization or ratification fail to satisfy
3 federal pleading standards” where the plaintiff has not “alleged a single fact tending
4 to show that any officer, director, or managing agent took any action amounting to
5 authorization or ratification of the alleged misconduct or had knowledge of the
6 unfitness of any employee”).

7 In this case, Plaintiffs argue that they are seeking punitive damages against
8 Cosway, a corporation or corporate employer, directly and not because of its
9 employees. However, Plaintiffs misapprehend California Civil Code § 3294(b), and
10 that Cosway is a corporation, not any individual employer, and it can only act through
11 its employees, officer, director, or managing agent. As previously stated, Plaintiffs
12 just allege: “As a direct and proximate result of Defendants’ above-referenced
13 negligence and gross negligence, Plaintiffs have suffered and are entitled to recover
14 damages, both compensatory and punitive,” and nothing more. FAC, ¶ 264. These
15 allegations are merely conclusory. Further, Plaintiffs fail to identify any individual at
16 Cosway, or even an officer, director, or managing agent of Cosway. Moreover,
17 Plaintiffs fail to plead any facts demonstrating that an individual at Cosway
18 authorized, ratified, or had knowledge of any act of malice. Therefore, in the absence
19 of such allegations, the FAC fails to plead a punitive damages claim against a
20 corporation under § 3294(b). See O’Brien v. HII Ins. Sols., No. 2:20-cv-02115-KJM-
21 AC, 2021 WL 1060398 (E.D. Cal. Mar. 19, 2021) (dismissing a punitive damages
22 claim that included only a “conclusory statement” of authorization or ratification with
23 no supporting facts).

24 In sum, Plaintiffs’ FAC relies on conclusions, not factual allegations to show
25 that they are entitled to a plausible claim for punitive damages against Cosway.
26 Indeed, Plaintiffs have failed to show that Cosway’s alleged conduct rose to the level
27 of oppression, fraud, or malice, or that Cosway either authorized or ratified
28 oppressive, malicious, or fraudulent conduct by an unfit Cosway employee.

1 Accordingly, the Court should dismiss the claim and prayer for punitive damages
2 from the FAC.

3 **III.**

4 **CONCLUSION**

5 For the reasons stated above, Defendant COSWAY CO., INC. respectfully
6 requests that the Court grant its motion in its entirety.

7
8 DATED: April 13, 2023

MURCHISON & CUMMING, LLP

9
10 By: /s/ *Gina E. Och*

11 Richard C. Moreno

12 Gina E. Och

13 Attorneys for Defendant, COSWAY CO.,
14 INC.

DECLARATION OF GINA E. OCH

I, Gina E. Och, declare and state:

I am an attorney-at-law licensed to practice in the State of California and I am a partner with Murchison & Cumming, LLP, counsel of record herein for Defendant, COSWAY CO., INC. I am one of the attorneys at our firm responsible for handling the defense of this matter on behalf of Defendant, COSWAY CO., INC., and, on this basis, and upon such other bases set forth below, I have personal knowledge of the matters set forth in this Declaration, except where stated on information and belief, and could and would competently testify to them under oath if called as a witness.

1. This Motion is made following the conference of counsel pursuant to Local Rule 7-3, which took place on March 20, 2023, March 27, 2023, and March 28, 2023.

2. As part of the parties' meet and confer process, Plaintiffs agreed that they would dismiss the Third Cause of Action for Violation of California Consumer Protection and False Advertising Law against Defendant COSWAY CO., INC., which Defendant COSWAY CO., INC. accepted.

3. The parties, however, could not reach an agreement with respect to the claim and prayer of the punitive damages pled in the First Amended Complaint.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 13th day of April, 2023, at Los Angeles, California.



Gina E. Och

PROOF OF SERVICE

**Michelle Albahae vs. Olaplex Holdings, Inc.
2:23-cv-00982-RGK-PLAx**

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 801 South Grand Avenue, Ninth Floor, Los Angeles, CA 90017-4613.

On April 13, 2023, I served true copies of the following document(s) described as **NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES** on the interested parties in this action.

BY E-MAIL OR ELECTRONIC TRANSMISSION: Pursuant to the E-Filing System of the United States District Court, Central District of California, to the parties at the e-mail addresses on the Court's website.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on April 13, 2023, at Los Angeles, California.



Michelle L. Fisher